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DEPARTMENT OF COMMERCE

International Trade Administration

Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings

AGENCY: Import Administration, International Trade Administration, Department of Commerce

ACTION: Announcement of change in methodology.

SUMMARY: After consideration of public comments, the Department of Commerce ("the Department") will implement a methodological change to reduce export price or constructed export price in certain non-market economy ("NME") antidumping proceedings by the amount of export tax, duty, or other charge, pursuant to section 772(c)(2)(B) of the Tariff Act of 1930, as amended ("the Act").

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SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 772(c)(2)(B) of the Act, the Department is instructed to reduce the export price or constructed export price used in the antidumping margin calculation by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(C) {of the Act}." However, the Department's past administrative practice has been not to apply section 772(c)(2)(B) of the Act

in NME antidumping proceedings because pervasive government intervention in NMEs precluded proper valuation of taxes paid by NME respondents to NME governments. This practice originated in the less-than-fair-value investigations of pure magnesium and magnesium alloy from the Russian Federation, which the Department then considered to be an NME country. *See Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 FR 16440 (March 30, 1995) ("*Russian Magnesium*"), at Comment 10. In those investigations, the Department determined not to reduce the NME respondents' U.S. prices for an export tax paid to the NME government, the Russian Federation. *Id.*

In subsequent litigation challenging that determination, the Department explained its reasoning as follows:

> The {NME} is governed by a presumption of widespread intervention and influence in the economic activities of enterprises. An export tax charged for one purpose may be offset by government transfers provided for another purpose.
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> To make a deduction for export taxes imposed by a NME government would unreasonably isolate one part of the web of transactions between government and producer. The Department's uniform approach to intra-NME transfers can be seen in its policy regarding transfers (or "subsidies") paid by a NME government to a NME producer. The Department—with the approval of the Court of Appeals—has declined to find such transfers to be subsidies given the nature of a {NME}. Such an economy is riddled with distortions, with the government influencing prices and cost structures, regulating investment, wages and private

> ownership, and allocating credit. Attempts to isolate individual government interventions in this setting—whether they be transfers from the government or from exporters to the government—make no sense.

See Remand Redetermination: Magnesium Corp. of America, *et al.* v. United States, at 6-8, dated Oct. 28, 1996 ("Remand Redetermination") (available at: http://ia.ita.doc.gov/tlei/index.html). The U.S. Court of International Trade ("CIT") upheld the Department's remand results. *See Magnesium Corp. of America v. United States*, 20 CIT 1464, 1466 (1996). The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") then affirmed the CIT's decision, stating that it agreed with the reasoning put forward in the Department's Remand Redetermination. *See Magnesium Corp. of America v. United States*, 166 F.3d 1364, 1370-71 (Fed. Cir. 1999) ("*Mag. Corp. III*").

However, since *Mag. Corp. III*, the Department has changed its practice with respect to application of the countervailing duty ("CVD") law to subsidized imports from the People's Republic of China ("the PRC") and the Socialist Republic of Vietnam ("Vietnam"), which the Department continues to designate as NME countries for antidumping purposes. As explained in the CVD investigations of coated free sheet paper from the PRC and polyethylene retail carrier bags from Vietnam, the present-day Chinese and Vietnamese economies are sufficiently dissimilar from Soviet-style economies that the Department can determine whether the Chinese or Vietnamese governments have bestowed an identifiable and measurable benefit upon a producer, and whether the benefit is specific, including certain measures related to taxation. *See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) ("*CFS Paper*"); "Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy,"

dated March 29, 2007 (available at: *http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf*); *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 74 FR 45811, 45813-14 (September 4, 2009), unchanged in *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 75 FR 16428 (April 1, 2010) ("*PRCBs*"), and accompanying Issues and Decision Memorandum at III ("Applicability of the CVD Law to Vietnam").

Pursuant to its determination that subsidies from certain NME governments to NME companies can be identified and measured, the Department has reconsidered its administrative practice that taxes paid by NME companies to these NME governments cannot be identified and measured. Specifically, the Department has proposed a change to the administrative practice explained in *Russian Magnesium*, as upheld in the *Mag. Corp.* cases, with respect to the PRC and Vietnam. *See Proposed Methodology for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings; Request for Comment*, 76 FR 4866 (January 27, 2011) ("*Proposed Methodology*"). Under that proposal, the Department, pursuant to section 772(c)(2)(B) of the Act, would reduce export price and constructed export price used in NME dumping margin calculations by the amount of export taxes and similar charges, including value added taxes ("VAT") not rebated upon export, in less-than-fair-value investigations and administrative reviews of antidumping duty orders. *Id.* This methodology may later be applied to other NMEs, pursuant to a determination that the NME at issue is sufficiently dissimilar from Soviet-style economies.

After consideration of public comments, the Department is hereby adopting the following

methodology to implement section 772(c)(2)(B) in antidumping duty investigations and administrative reviews involving merchandise from the PRC and Vietnam.

Methodological Change

In antidumping duty investigations and administrative reviews involving merchandise from the PRC and Vietnam, the Department will determine whether, as a matter of law, regulation, or other official action, the NME government has imposed "an export tax, duty, or other charge" upon export of the subject merchandise during the period of investigation or the period of review (*e.g.*, an export tax or VAT that is not fully refunded upon exportation). The Department anticipates that parties would place upon the record copies of laws, regulations, other official documents, or similar publicly available information that identify the particular tax imposed on certain exports by the PRC or Vietnamese government. The Department will also consider evidence as to whether the particular respondent(s) was, in some manner, exempted from the requirement to pay the export tax, duty, or other charge. The Department anticipates that such evidence would include official documentation of the respondent's exemption.

Provided that the NME government imposed an export tax, duty, or other charge on subject merchandise as contemplated by section 772(c)(2)(B) of the Act, from which the respondent was not exempted, the Department will reduce the respondent's export price and constructed export price accordingly, by the amount of the tax, duty or charge paid, but not rebated. The Department anticipates that, in many instances, the export tax, VAT, duty, or other charge will be a fixed percentage of the price. In such cases, the Department will adjust the export price or constructed export price downward by the same percentage. In other instances where the tax or charge is a flat fee or nominal sum denominated in NME country currency, the Department will determine the ratio of the flat fee to the respondent's export price or constructed

export price as denominated in its domestic currency, and then adjust the export price or constructed export price downward by the same ratio.

Analysis of Public Comments

The Department received and carefully considered seventeen comments on the *Proposed Methodology*. Summaries of the comments, grouped by theme, and the Department's responses are provided below.

Selective Treatment of Internal NME Tax Transactions

Opponents of the *Proposed Methodology* contend that the Department cannot engage in selective use of certain NME transactions for dumping margin calculation purposes. Those commenters argue that, if there is a basis to use internal NME tax transactions for antidumping margin calculation purposes, then there is a basis for using other internal NME transactions as well. Opponents of the change further suggest that the proposal also does not consider other cost elements that are presumed to be reflected in a price from a market economy country, but not from an NME country.

Interests favoring the *Proposed Methodology* assert that, because of the tax-free normal values used in NME antidumping methodology proceedings, the proposed modification would result in a preferred tax-neutral dumping margin calculation. Other commenters suggest that the Department should expand its methodological change and adjust for all NME taxes and charges that impact margin calculation, not just export taxes and VAT.

Department's Position: In adopting this methodological change, the Department considers taxes levied by the Chinese and Vietnamese governments to be different from other internal transactions between companies in an NME context. Although we do not know how individual companies in those NME countries set prices, we do know that the government taxes a

portion of companies' sales receipts. Consistent with our CVD determinations in *CFS Paper* and *PRCBs*, we can measure a transfer of funds between certain NMEs and companies therein, regardless of the direction the money flows. Given that, and given that we know how much respondent companies receive for the U.S. sale, we have determined it appropriate to take taxes into account, as directed by the statute. *See* section 772(c)(2)(B) of the Act.

Specifically, the statute defines an NME as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." *See* section 771(18) of the Act. As a result, when the Department evaluates whether a tax is included in the price of an NME export sale, it cannot take into consideration the same assumptions as those taken into account when performing a similar type of evaluation for a market economy sale, which does operate in accordance with market principles of cost or pricing structures. Accordingly, it is not an issue of price formation (*i.e.*, whether the seller considers tax when forming price) because that is a market economy concept which is inapplicable by the very definition of an NME.

Additionally, because these are taxes affirmatively imposed by the Chinese and Vietnamese governments, we presume that they are also collected.[1] The unrefunded VAT or affirmatively imposed export tax only arises through the fact that there were export sales. As a result, because the liability arises as a result of export sales, this is where payment originates. Therefore, to achieve what is called for in the statute, the gross price charged to the customer must be reduced to a net price received. In cases involving imports from the PRC or Vietnam, "included in the price" means whether the respondent has reported a price which is

[1] As stated above, the Department's methodological change allows individual companies the opportunity to demonstrate that the particular respondent(s) was, in some manner, exempted from the requirement to pay the export tax, duty, or other charge.

gross (*i.e.*, inclusive) or net (*i.e.*, exclusive) of tax. As such, if a gross price has been reported, a deduction must be made for those taxes imposed on the sale, and if a net price has been reported, deductions are not required. We note that, in prior cases involving imports from the PRC or Vietnam where the Department was aware that such a tax was imposed, it has typically been expressed as a percentage of the export selling price. Therefore, any such deduction to export price would also be performed on a percentage basis.

We further note that deducting internal NME tax transactions from export price or constructed export price is consistent with the Department's longstanding policy, which is consistent with the intent of the statute, that dumping comparisons be tax-neutral. *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27369 (May 19, 1997) (*citing* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1, 827, reprinted in 1994 U.S.C.C.A.N. 3773, 4172).

In response to comments that the methodological change does not consider other cost elements that are presumed to be reflected in a price from a market economy country, but not from an NME country, we note that the new methodology does not consider other elements of cost or price because, pursuant to section 773(c)(1)(B) of the Act and consistent with the PRC's and Vietnam's Protocols of Accession to the World Trade Organization ("WTO"), the Department can reject internal costs and prices in an NME country for antidumping and countervailing duty purposes. What is relevant for margin calculation purposes is the net revenue the company ultimately receives on sales made to its U.S. customers, after adjusting for taxes, as provided for by the statute.

Magnesium Corp.

Certain commenters argue that the *Proposed Methodology* is inconsistent with the

Federal Circuit decision in *Mag. Corp. III*, which sustained the Department's rationale for not deducting export taxes from U.S. price in the *Russian Magnesium* investigation. Proponents of the proposed methodological change contend that the deduction for VAT, export tax, and other charges from export price or constructed export price is mandatory under the plain language of section 772(c)(2)(B) of the Act. Those parties further note that the Federal Circuit in *Mag. Corp. III* found it within the Department's discretion to determine whether VAT and export taxes should be deducted from USP. To the extent the Department's prior practice had its origins in the *Russian Magnesium* investigation, interests favoring the proposal assert that the current Chinese and Vietnamese economies are different from the Russian economy of that era in that the Department, having found that it can apply the CVD law to the PRC and Vietnam, is able to identify certain other transfers between governments and companies in those countries.

Department's Position: The Federal Circuit did not find that the Department could not apply the relevant statutory provision in an NME context. It simply agreed with the Department's stated rationale *at the time* for not doing so, which the Department applied in a context different from the economies of the present-day PRC and Vietnam. Given the realities of those two economies today, the Department's understanding of the phrase "if included in such price" in section 772(c)(2)(B) of the Act has evolved accordingly in the manner described above. Thus, the change in methodology is the consequence of the inapplicability of the reasoning of *Russian Magnesium* to the PRC and Vietnam today.

Application of CVD Law to the PRC and Vietnam

Parties opposing the methodological change contend that the Department's proposal relies heavily upon the Department's analysis in the *CFS Paper* CVD investigation, which is at odds with the Department's previous insistence upon the distinctiveness of the antidumping and

CVD regimes as well as the recent CIT decision in *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010) ("*GPX*"), that calls into question the legality of applying the CVD law to the PRC.

Department's Position: As discussed above, the methodological change does rely in part upon the Department's analysis in the *CFS Paper* investigation. Whether or not the proposal is at odds with any previous insistence upon the distinctiveness of the antidumping duty and CVD regimes, the statute requires a deduction for certain taxes from U.S. price. In *CFS Paper* and *PRCBs*, the Department found that it could identify and take into account a government-supplied subsidy in certain NME contexts. Given that a government imposed tax is also a transfer of funds between the government and a company, we have relied upon *CFS Paper* and *PRCBs* solely to recognize this government-imposed tax.

With respect to the CIT decision in *GPX* cited by certain parties, the Department continues to apply the CVD law to the PRC and Vietnam. In that regard, the President on March 13, 2012, signed into law H.R. 4105, "To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes." H.R. 4105 amended the Act, among other purposes, to confirm that the Department must apply the CVD law to subsidized imports from certain countries designated as NMEs under the AD laws. *See* section 701(f)(1) of the Act. The Federal Circuit has acknowledged that H.R 4105 overturns its earlier ruling affirming the CIT's judgment in *GPX*. *See GPX Int'l Tire Corp. v. United States*, 2012 U.S. App. LEXIS 9444 (Fed. Cir. May 9, 2012).

Allegedly Distortive Elements of the Proposed Methodology

Some commenters argue that the proposal does not account for how export taxes and VATs actually operate in the PRC, thereby resulting in distortions.

Department's Position: It is correct that the proposal does not attempt to address every aspect of the PRC's and/or Vietnam's respective export tax and VAT systems. This methodological change simply reflects that the statute calls for the Department to adjust U.S. price for export taxes, irrespective of whether they are levied in a market economy or NME context. Indeed, subsequent to implementation, the PRC's and/or Vietnam's VAT and export tax systems may change. We simply are recognizing with this methodological change that the PRC and Vietnam are dissimilar from Soviet-style economies, which was the context in which we adopted the policy not to make the adjustment for VAT and export taxes. As a result, we are planning to apply the relevant statutory provision to merchandise from the PRC and Vietnam. If there is a peculiarity with respect to the system or how it is applied in a given case, parties are encouraged to discuss it, and we will address those comments on a case-by-case basis.

Competitiveness of U.S. Manufacturers

Certain parties comment that the *Proposed Methodology* would negatively affect the competitiveness of U.S. manufacturers that rely upon imported raw materials through likely increases in antidumping margins on merchandise imported from the PRC and Vietnam, thus undermining the objectives of the National Export Initiative ("NEI"). To that end, one commenter suggested that the *Proposed Methodology* is inconsistent with the United States' position in the WTO dispute involving Chinese restrictions on the export of raw materials (*China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394) that PRC export taxes harm U.S. manufacturers that consume PRC-origin merchandise. In contrast, another commenter commends the methodological change for advancing the objectives of the NEI.

Department's Position: The Department disagrees that the methodological change

undermines the objectives of the NEI. Those objectives focus on facilitating increased U.S. exports. Moreover, the enforcement of U.S. trade remedy laws is an explicit component of the NEI, and toward that end, tax-neutral dumping margin calculations, *i.e.*, those based on VAT- and export tax-exclusive U.S. price and normal values, result in antidumping duties that further level the playing field for domestic manufacturers and increase their potential export competitiveness. For that reason, we disagree that there is any inconsistency between the Department's proposal and the United States' position in the WTO dispute on Chinese export restrictions. Both represent necessary and appropriate responses to the market- and price-distorting effects of export taxes.

Furthermore, this methodological change is substantively distinct from the positions and arguments raised by the United States in the WTO dispute, which were informed by particular commercial policy concerns related to the availability of raw materials and involved certain WTO rules and obligations that are not at issue here. As noted above, section 772(c)(2)(B) of the Act is a statutory requirement. Given the changes in our practice with regard to the PRC and Vietnam (*i.e.*, the application of the CVD law), we are simply acknowledging that we can now apply section 772(c)(2)(B) of the Act in proceedings involving merchandise from the PRC and Vietnam to ensure tax neutrality in our dumping margin calculations, and make the adjustments that we would otherwise ordinarily make under the statute.

Implementation

The methodological change detailed above will be applied to future administrative NME proceedings involving merchandise from the PRC and Vietnam initiated after publication of this notice.

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Assistant Secretary
for Import Administration

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Date

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